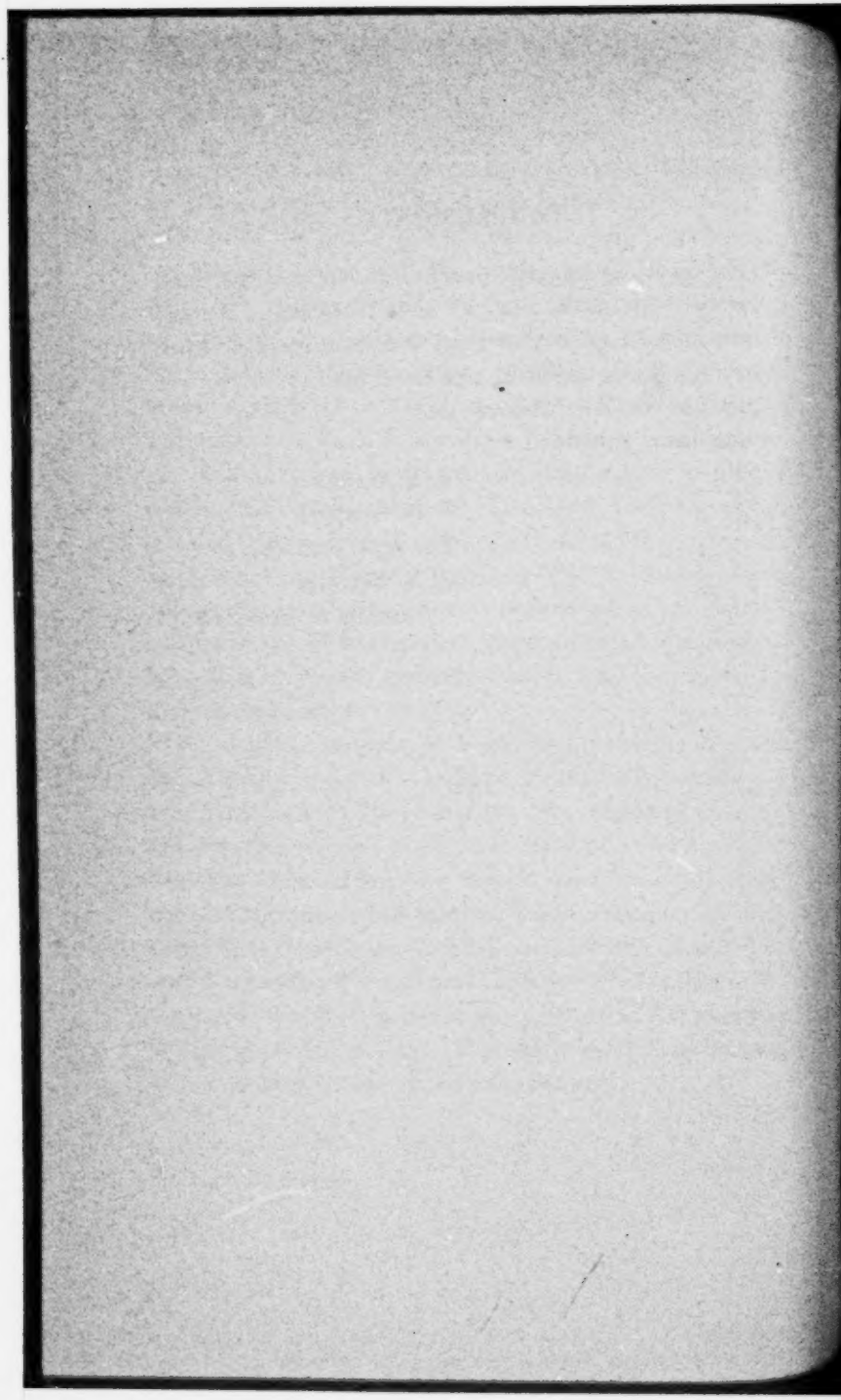

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 159.

THE FOURTH NATIONAL BANK OF ST. LOUIS, FIRST NATIONAL BANK OF NEW YORK, AND FORD HARVEY, APPELLANTS,

v.

MORTON ALBAUGH, RECEIVER OF THE FIRST NATIONAL BANK OF EMPORIA; F. C. NEWMAN, ADMINISTRATOR OF THE ESTATE OF C. S. CROSS, DECEASED, AND WILLIAM MARTINDALE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR MORTON ALBAUGH, RECEIVER OF THE FIRST NATIONAL BANK OF EMPORIA.

E. W. CUNNINGHAM,
T. F. GARNER,
FRANK HAGERMAN,
Appearances for Appellants.
MORTON ALBAUGH,
Receiver, &c.,
JOSEPH R. WEBSTER,
Appearances for Appellee.
J. JAY BUCK,
Of Counsel in Appellate Court.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9454

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STATEMENT.

The whole record is printed. The appellants' statement is so materially incomplete that it is necessary to restate the case entire.

1. November 16, 1898, the First National Bank of Emporia, Kansas, with $100,000 capital and $100,000 surplus, failed. Its president, C. S. Cross, a suicide, was insolvent, owing the bank about $300,000. Its vice-president, William Martindale, officing in its banking-room, a director and member of its discount board, was also insolvent, owing the bank $76,000 (R., 139). Cross had made three bills of sale

of all his personal property, in the nature of mortgages, to William Martindale, as trustee. The first, March 4, 1898 (R., 170), was as security to the First National Bank of Emporia. The later ones, July 15 and November 15, 1898 (R., 166 and 167), are claimed to have been made to indemnify Martindale against loss upon joint obligations of himself and Cross, upon which, as between themselves, he was surety for Cross. This action was brought by the Fourth National Bank of St. Louis, holder of two obligations of Martindale and Cross, for subrogation to Martindale's equity in the two later mortgages. The First National Bank of New York and Ford Harvey, the other appellants, by cross-bills claimed the same relief, *pro rata*, to their demands, claimed to be of like character. The effect of these claims, if upheld, would, under an "equity of subrogation," give all of Cross's property to Martindale and Cross's creditors for Martindale's protection, although he owed the bank a much larger sum, and had he as surety paid such joint debts could not be allowed to claim such protection against the bank, toward which both he and Cross had shamelessly violated and abused their trusts.

February 28, 1899, the Fourth National Bank of St. Louis, in equity, in the United States circuit court, district of Kansas, sued the appellees and the First National Bank of New York, Ford Harvey, and H. C. Whitley, as defendants. The parties, except Harvey, voluntarily appeared (R., 50). The parties for brevity are respectively styled, viz: Fourth National Bank of St. Louis, Missouri, "St. Louis bank;" First National Bank of New York, "New York bank;" First National Bank of Emporia, Kansas, "Emporia bank;" Morton Albaugh, its receiver, "receiver;" F. C. Newman, administrator of the estate of C. S. Cross, deceased, "administrator;" Ford Harvey, H. C. Whitley, and William Martindale by their surnames.

By stipulation, the mortgaged property was sold and its proceeds stand in its place. The circuit court decreed all the fund, $53,396.89, to be paid to the receiver (R., 173, 174).

The St. Louis bank, New York bank, and Harvey appealed (R., 175) to the United States circuit court of appeals, which affirmed the decree (R., 211), and further appealed to this court (R., 219, 220).

Complainants' amended bill, filed April 14, 1899 (R., 11), by consent of Martindale and the administrator, on which the trial was had, averred, in substance:

The corporate organization of the St. Louis Bank in Missouri; of the Emporia Bank of Kansas, its insolvency and appointment of its receiver; the administrator's appointment and citizenship of the administrator, Harvey, Whitley and Martindale in Kansas; that Cross was president of the Emporia bank and died owning large personal property at Sunny Slope farm near Emporia, unincumbered except as herein mentioned; on and before July 15, 1898, the St. Louis bank held and still holds unpaid two notes of $10,000 each, as between Martindale and Cross—in fact, debts of Cross, viz: *a*, by S. Nation to order of Martindale and Cross, by them endorsed and renewed in like form; *b*, by Martindale and Cross to the St. Louis bank taken up and replaced by one of C. V. Eskridge to Martindale and Cross and by them endorsed. Cross, July 18, 1898, made, executed and delivered to Martindale as trustee a chattel mortgage (Ex. C., R., 14) of said Sunny Slope property conditioned, *first*, to protect Whitley and Martindale, sureties on a certain bond; *second*, to pay Martindale any paper on which he and Cross were mutually makers or endorsers; *third*, to pay the balance to the Emporia bank for all matters he owed to it; also, November 15, 1898, a bill of sale, absolute in form (Ex. D., R., 15), but in fact a further security for said indebtedness. Cross died November 16, 1898, and Martindale at once took possession of all the mortgaged property, when the receiver seized and without right took it from him, whereupon all parties interested signed a stipulation (Ex. E., R., 15) for sale of the property, its proceeds to await adjudication of right thereto, which sale was made and the proceeds, about $55,000, are now held under said agreement (R., 13). *The St. Louis bank and all others holding paper on which Martindale and Cross are bound, which under the agreement between them should be paid by Cross are entitled to be subrogated to Martindale's rights and to be paid out of said fund,* among which are the New York

bank, Harvey and Whitley. Prayer for account of the sums due those entitled to share and for its distribution in accordance with their equities and for judgment against Martindale for $20,000 and 6% interest from December 19, 1898.

The New York bank filed answer and cross-bill April 22, 1899 (R., 17), alleging in substance that—

all averments of fact in the bill were true and its conclusions of law correct; that July 15, 1898, it held a debt of Cross of $30,000 made by Martindale and Cross, W. Martindale, C. S. Cross, due October 3, 1898, renewed by a like note due December 5, 1898, in fact the debt of Cross as between them, and intended by Cross to be secured by the mortgage and bill of sale, and *this defendant is entitled to be subrogated to the rights of said Martindale under said chattel mortgages* and to receive *pro rata* the proceeds of the mortgaged chattels. Prayer for distribution of the fund and for judgment against Martindale for $30,000 and 6% int. from Oct. 3rd, 1898.

Harvey's intervening petition, filed March 21, 1900 (R., 128), recites the bill in substance (R., 128), and, in substance, avers (R., 130):

A note made by Cross July 30, 1898, to him (Harvey) for $10,000, for six months, at 7% interest, endorsed by Martindale before delivery, in fact the debt of Cross, unpaid, admits all averments of the bill, and cross-bill of New York bank, prays account and distribution *pro rata* of the fund.

Martindale answered April 28, 1899 (R., 18), and in substance—

admits all facts set out in the bill; denies all averments of the pleadings of the administrator, receiver, and New York bank. Avers that the Union National Bank of Kansas City, Missouri, is holder of a $10,000 note of Cross, signed by him (M.) as surety, and has the same relation to the fund as the St. Louis and New York banks, and said Union bank is a necessary party. Prayer that the Union National Bank

of Kansas City, Mo., be made party and required to plead, and that judgment go against him only as surety and for proper equitable relief.

The administrator's answer (R., 16–25) claimed the fund for administration for benefit of creditors generally. After the decree of the circuit court the administrator made no further contention and did not appeal. An extended abstract of his former contention is unnecessary on this appeal.

The Receiver's answer (R., 133) admitted the corporate character of the several banks, and the receiver's appointment, and alleged that Cross died sole owner of the property, free of all liens save a bill of sale to Martindale, trustee, which in legal effect was the chattel mortgage of Cross to the Emporia bank; that just prior to March 4, 1898, Cross was compelled to have a large sum of money to avoid sacrifice of the mortgaged property, and being president of the Emporia bank appealed to Martindale, its vice-president and member of its discount board, and procured from the Emporia bank through Martindale at least $40,000 for his own private uses and as part of the same transaction executed and delivered to Martindale as trustee for the Emporia bank a bill of sale or chattel mortgage to secure the money then obtained, and other sums then due from him to the bank; that Martindale accepted the trust and never during Cross's life repudiated it. At that time Cross owed the bank much more than the value of the property, and with the $40,000 then obtained, amounting to nearly $300,000, all of which Martindale knew and therefore could not legally receive or accept for himself or for others further conveyances of said property, and the bills of sale alleged in the amended bill are void as against the receiver's claim. The Emporia bank had long been insolvent, as Martindale and Cross knew. Immediately upon Cross's death the receiver took possession of all the property in suit, and at the Emporia bank's expense cared for and sold it and deposited its proceeds to the credit of the administrator and himself under the stipulation (Exh. E, R., 15). January 2, 1900, he first learned the principal facts here pleaded regarding the March 4, 1898, bill of sale (Exh. A, R., 135–'6), which covered all of Cross's property not exempt by law, as Martindale, vice-president of

the Emporia bank, well knew, and in his giving said credit to Cross, and in the making and acceptance of the instrument, Martindale and Cross both intended it solely as a security to the Emporia bank. Prayer for dismissal of the bill and recovery of the fund to the use of his trust.

DECREES BELOW; APPEALS; ERRORS ASSIGNED.

After a hearing the circuit court made a decree (R., 173) March 22, 1900, dismissing the bill and all intervening and cross bills, except the receiver's, giving him all the fund under the March 4, 1898, bill of sale. The St. Louis and New York banks and Harvey only appealed (R., 175), assigning errors jointly and severally (R., 176 to 199). The matter was heard in the appellate court and affirmed (R., 211). The St. Louis and New York banks and Harvey jointly assigned errors (R., 212) and petitioned for allowance of appeal, gave an approved bond (R., 218, 219), and citation issued (R., 220).

The proofs consisted of (*a*) oral testimony taken before a special examiner (R., 27 to 127); (*b*) oral testimony and documentary evidence adduced before the court, transcribed by the stenographer (R., 136 to 173); (*c*) stipulations (R., 131) as to Harvey's note (R., 132); as to the Liebfried suit and bond (R., 161), and that such suit was finally dismissed and the bondsmen's liability terminated.

COMPLAINANTS' EVIDENCE.

S. NATION testified (R., 27–41) that his note to Martindale and Cross carried by the St. Louis bank represented what originally was a debt of Cross's father and was an accommodation note given at Cross's request, such as (R., 31) he had often given to Martindale & Cross, at the bank, not more than two of $10,000 each in any one day, but hundreds of thousands of dollars in the aggregate, "enough to build the Nicaragua canal."

C. V. ESKRIDGE testified (R., 41–65) that no consideration moved to Martindale for either of two $10,000 notes of Octo-

ber 24, and November 14, 1898, to Martindale and Cross endorsed "Martindale & Cross," "C. S. Cross," "W. Martindale," the first to the New York bank, the second to the St. Louis bank. He, Martindale, Severy, and Cross's father, H. C. Cross, had formed a partnership by written articles (R., 55) January 2, 1882, for publishing a newspaper (R., 54). The paper bought a lot and erected a building, in which Martindale and Cross took some interest. "I knew Martindale had an interest in the grounds and buildings." The *Emporia News* was purchased and Cross said (R., 44) that "Martindale would take an interest." He first found out Martindale was interested in the newspaper business eight or ten years ago [1889–'91]. He took up the paper assuming whatever interest any other party claimed (R., 45). These matters ran on about eighteen years, and they "never had a settlement," and he "signed any paper Cross desired signed, hardly taking any account of it." "When he wanted a note signed I signed it" (R., 48). Martindale took $5,000 of $25,000 of the newspaper corporation stock (R., 51). He had been giving these "accommodation" notes for perhaps fifteen years. When the bank failed he supposed his actual indebtedness to it was $10,000 or $15,000, or perhaps $20,000 (R., 53). Anything above that he thinks is accommodation paper (R., 52). The note (Ex. 2), held by the St. Louis bank, *may have represented a part of his legitimate debt.*

H. P. CLARK, book-keeper (R., 84), testified from the Emporia bank books that the two St. Louis bank's notes A & B of $10,000 each were renewals of two like notes, dated October 13, 1898, which took the place of one note of $10,000 and one of $6,786.45, by S. Nation, September 19, 1898, to Martindale & Cross, endorsed like those in suit, and a note of $10,000 by W. J. Ryan (R., 86), December 20, 1897, to Martindale and Cross, with like endorsements, all amounting to $26,786.45. The Nation notes had been carried by renewals from November 16, 1897, with like endorsements.

The $30,000 New York note was a renewal of a like note of May 2, 1898, discounted there to take up other indebtedness of Martindale and Cross then maturing.

WILLIAM MARTINDALE testified (R., 137) he and Cross signed the New York bank note. Cross was compelled to give a bond, and he with Col. Whitley signed it. Whitley said that "is a large bond we signed for Cross, it is safe, is it?" I told Cross that "Whitley is a little bit worried

about that bond." Cross said "I think I ought to give you and Col. Whitley a bill of sale or mortgage to protect you and protect you for the paper you have endorsed for me." He wrote the bill of sale, I took it to show Whitley, but he wasn't in, and I took it to my house, where it remained till Cross's death, when I gave it to my attorney (R., 138). The New York and St. Louis banks' notes were then outstanding. November 15, 1898, Jobes, the examiner, was there, and we did not know whether the bank would be closed. I asked Cross "How much paper am I on with you?" Cross said the New York, St. Louis, Harvey, and Union National $10,000 notes. He said, "Can I use your desk?" I said "Yes." He wrote this instrument (Ex. D; R., 15), and came out and handed it to me.

On cross-examination, under objection, he testified (R., 144): He received a bill of sale prior to that of July [1898]. Received that early in March, I would think at its date [March 4, 1898, Ex. I, R., 170]. Cross said he wanted to use $7,500 of the bank funds in the Liebfried matter, and wanted to make a mortgage or bill of sale to cover that amount (R., 147); denied telling Bank Examiner Jobes that any of the New York or St. Louis banks' debt was his own obligation (R., 139, 142). Was entirely ignorant that Cross or himself owed the bank anything, though it turned out that he owed it $76,000 and $37,000 as stockholder's liability (R., 142); does not recollect that Cross under oath told the bank examiner in his presence that the property was free and clear, and belonged to and would inure to the Emporia bank (R., 143). The night of the day Cross died Mrs. Cross gave him papers she found, being two bills of sale (Ex. D, R., 167, and Ex. E, R., 167), both dated July 14, 1898, and letters H and H 2 of July 13, and May 21, 1898 (R., 169). (R., 144:) Denied that closing the bank was talked of at Jobes's examination in May, 1898, or that an indulgence of six months was then granted (R., 146). Denied knowing that the property in suit was represented to be unincumbered in the report to the Comptroller of August 2, 1898 (Ex. J, R., 171), which he signed (R., 147), *but don't know, as he would have called attention to his incumbrance if he had known such statement was there* (R., 148); he signed (Ex. J, R., 168) that the Ryan $10,000 note in St. Louis bank was his own debt (R., 149). He and Cross were jointly interested in the Salina Gas Company, a corporation (R.,

152), which he supposed owed the bank $5,000, but did not know it owed the bank $75,000. Had a little interest with Cross at Carl Junction, Mo. (R., 150), July 13, 1898. The only bill of sale by Cross he knew of was that of March 4, 1898, given to protect the Emporia bank (R., 154). After Cross's death he told Johnson, Henning, and perhaps Plumb that he would not claim under his bill of sale; he then thought his property worth $200,000, and that he could meet all his obligations, and that if the property in suit would bring $40,000 it would save the Emporia bank, and told them he would let it go to the bank.

THOMAS EVANS (R., 66) testified:

He was superintendent of the Sunny Slope farm. The afternoon of Cross's death Martindale told him to see that everything was taken care of as usual. A few days later, at his home, Martindale said he had a bill of sale of all the stock there, and wanted Evans to take charge of it as before (R., 71). No one could have observed any change in the possession. He did not mention to the receiver that he was holding possession for Martindale or of his claiming to have a bill of sale.

STIPULATIONS.

(R., 132:) June 17, 1898, Liebfried sued Cross for accounting as partner in the Sunny Slope to cancel $20,000 of notes Liebfried had given Cross, and praying recovery of $35,000, a receiver, and an injunction. A receiver was denied, but an injunction was allowed unless Cross give bond to pay any judgment Liebfried might recover. Martindale and Whitley, as sureties, gave such bond. October 14, 1898, Cross obtained a verdict. Liebfried moved a new trial, which was denied January 2, 1899, and suit was dismissed October 30, 1899 (R., 139). The bond liability (R., 166) might have been $75,000, but has ceased (R., 132). Administrator was appointed November 26, 1898. Exh. E, at R., 15, for sale of the property, was signed November 26, 1898.

(R., 131:) For Harvey. Cross borrowed of him $10,000

and gave the note (Exh. A, R., 130) which, with interest, is unpaid. Martindale endorsed it as surety. Harvey had no knowledge of the disposition of its proceeds.

EVIDENCE FOR RECEIVER.

Martindale's cross-examination (R., 144) under objection, that:

the March 4, 1898, bill of sale (Exh. I, R., 170) he received, he thinks, at its date of Cross, who said he wanted to use $7,500 of the bank funds in the Liebfried matter and wanted to make a mortgage or bill of sale to cover that amount.

JOHN MADDEN (R., 155), one of administrator's counsel, testified:

That when they were taking testimony in the case they subpœnaed Martindale, who with his counsel asked to be excused from testifying, and made a statement of the facts about the March 4, 1898, bill of sale; said that Cross stated to him that he had borrowed from, and was largely indebted to, the bank and would have to use more money for Sunny Slope, and that he made this bill of sale and handed it to Martindale as security to the bank for those money matters. I have no recollection of any statement of $7,500 or of any other amount. [This on the St. Louis bank's motion the court excluded; R., 156.]

MORTON ALBAUGH, receiver, testified (R., 156):

Mr. Martindale stated January, 1900, that in March, 1898, Cross said he owed quite a large sum to the bank, expected to have to use more of the bank's money, and that he gave him this bill of sale for the protection and benefit of the bank.

On cross-exam.: This was since this suit was commenced. [Appellants here moved to exclude this testimony, which was overruled] (R., 157). Lambert questioned Martindale quite a little and asked the particulars about the different bills of sale. I am quite sure Martindale did not say anything with regard to any particular sum of money. No one asked him whether the March (R., 158), bill of sale was given with reference to any particular debt. Am quite

positive Martindale did not mention $7,500 or any particular amount.

Redirect: This was my first information of that [March 4, 1898] bill of sale, therefore my attention was attracted to it. On that I set up my answer claiming the property. Martindale produced it. I had not heard of it before.

J. E. LAMBERT (R., 159) was present at the interview mentioned. This was the first he had definite information of the March 4, 1898, bill of sale. Martindale then first, so far as I was informed, exhibited it. I then at once prepared the pleading for the receiver (R., 160). "He [Martindale] said Cross came into the bank, gave him a bill of sale, handed it to him, and he laid it on his desk; that it remained there until after the bank failed; that Cross said to him at the time he handed him the bill of sale 'I have used a large amount of the bank's money, I am compelled, or expecting, to have to use more of it in the Sunny Slope business, and I want to give this bill of sale for the purpose of protecting the bank or to secure the bank.'" Martindale mentioned no amount, did not mention $7,500. I was giving intent interest and attention to what he was saying. [Here appellants moved to strike out the foregoing from "R., 160" *supra* as hearsay and an attempt to impeach their own witness, which the court overruled, and appellants excepted.]

Cross-exam.: It is not my recollection that any one in the room asked if Cross mentioned how much or what particular amount. There was no talk of that kind by any of the parties, nor about $7,500, if there had been it would have impressed my mind and I would have remembered it, for I knew Cross's debt in March of that year [1898] to the bank was much in excess of $7,500.

F. C. NEWMAN, administrator (R., 163), testified: That Cross died November 16, 1898, and his debts other than to the Emporia bank were between $80,000 and $90,000.

C. S. JOBES, bank examiner (R., 164): Early in July, 1898, he discussed with Martindale portions of Cross's indebtedness to the Emporia bank, that part arising from discrepancies in the account with the New York bank; informed Martindale of Cross's explanation as to the $35,000 discrepancy, and asked if he verified that statement, which he did. Jobes then advised him of another with the New York bank (R., 165) of about $10,000, which Martindale could not ex-

plain. He discussed with Martindale, prior to November 15, 1898, Cross's large indebtedness to the Emporia bank. In a conversation had with Martindale, Cross, and Davis (referring to memorandum), I recited the discrepancies I noticed in the accounts of the New York bank of $6,787.50. It was explained by Cross or Martindale or by both that $300 of it was the debt of Martindale and Cross, $1,487.50 that of Martindale and Cross jointly, and $5,000 that of Cross; another of $2,550.27 in the Nat'l Bk. of Commerce, Kansas City, was admitted to be the debt of Cross; in the Bank of Madison $17,000, $12,000 was said to be Cross's debt and $5,000 Martindale's; in the St. Louis bank $22,798.94, a $10,000 Ryan note, was $5,000, the debt of Cross, and $5,000 of Cross and Martindale jointly. This was the evening of November 15, 1898.

Mrs. C. S. Cross (R., 162): The evening of Cross's death, about 6 p. m., Martindale came to her room, and about the first thing he said was, "Have you any papers for me, have you found any papers for me, or is there anything for me?" She gave him some papers found in an envelope addressed to her, with a note to her, which said: "Give the enclosure to Mr. Martindale at once, there is a question of law involved." She gave Martindale the enclosure, a Sherman House, Chicago, envelope, which Martindale opened. There were papers in it that she did not see. About 10 or 11 that night she called Martindale and gave him two bills of sale, one on a letter-head, and one on a form. About July 13, 1898, Cross was away, she did not know where (R., 163). She found the papers in her tin box to which Cross had a key. She searched because Martindale was so insistent that there must be something there.

Prior to the receiver's answer, while the administrator was defending for the estate, testimony was adduced, viz:

J. M. Johnson (R., 95) [over appellants' objection]: The Monday morning after the bank closed [November 21, 1898], he went to Martindale's house, anxious to learn something from headquarters. Mr. Martindale tried to make him believe the bank would pay out dollar for dollar. I "put the question how he expected the bank would realize this money. Martindate put a good deal of stress on the Sunny Slope business and figured it up," "thought it would realize

$40,000, and then the depositors would get that and get it soon if nothing hindered the sale." Martindale "thought it would pay out more than that, probably $50,000, and said: 'So you see, John, it will pay out $90,000, or $100,000, and you will get that very soon, and with the (R., 96) good paper that I know must be good and with my property behind that, too, you will get it if I have to go without a home and wear old clothes.'" "I asked him the question, if there was any indebtedness, could possibly be any indebtedness, that would come up that would hold this money and keep it from coming into the bank." He answered, "None in the least. It is an impossibility for it to be."

He had another conversation with Martindale in Henning's office. "It was just about the same time," in April, 1899. [See R., 27 and 127]. (R., 97:) "He said he had nothing to do with it" [the Sunny Slope property]. "He did not have no cinch on the Slope business, had nothing to do with the Slope business, never did."

Cross-exam.: In neither of these conversations did Martindale say anything about having a bill of sale.

JOHN HENNING (R., 107), over appellants' objection: Martindale attended a depositors' committee meeting February 23, 1899. Martindale said their resources were two or three times their liabilities; the bank would get all of the proceeds of Sunny Slope and that he had so many acres of land unincumbered he was willing to put in, and we would get 100c. on the dollar, and then Johnson he kind of questioned that and he * * * Martindale figured out that Sunny Slope would bring $50,000 or $55,000, something like that, and that he was amply able to make the balance. He did not say anything about a bill of sale [on the Sunny Slope property]. He just talked just like this was a sure thing, this Sunny Slope money.

GEORGE PLUMB (R., 107), one of the depositors' committee, over appellants' objection: At that time he [Martindale] then speaking about the amount that would probably be paid to the depositors, said that Sunny Slope would go in and figured what that would be. * * * We talked of the amount of stuff there was there, of the value of it. He never mentioned the bill of sale.

CHARLES W. JOHNSON (R., 109), over appellants' objection: I had a talk with him [Martindale] about a week or ten days after the bank closed, a few days afterwards. I met

him near the opera-house, and I asked him about what he thought we were going to get out of the proceeds of those cattle out there, and he said the Sunny Slope money would be the bank's, and would go to the depositors.

JOHN STOTLER (R., 110), over appellants' objection: I had a conversation with him [Martindale] at the Whitley hotel, I judge about a week after the failure of the bank. Mr. Charles Johnson was with me, and he told us we need not worry about our money. * * * He spoke about the Sunny Slope business, said the proceeds of that would come right into the bank. Not to my knowledge did he say anything about having a bill of sale or any incumbrance of any kind on the personal property at Sunny Slope.

C. S. JOBES (R., 98): Examined the Emporia bank November 9th to 15th, and closed its doors November 16, 1898, remaining in charge to February 16, 1899. (Over appellants' objection, R., 99): During the November, 1898, examination, "I informed Cross and Martindale that I had discovered discrepancies * * * amounting to between $6,000 and $7,000 in the case of the New York bank and to between $20,000 and $25,000, nearly $25,000, in the case of the St. Louis bank. * * * Cross explained to me how each item occurred, stating so much was the joint liability of himself and Martindale. I had a memorandum of the discrepancies in my hand, and turned to Martindale, asking him if the amounts named by Cross as the joint liability of Martindale and Cross were correct, and whether he recognized his liability thereunder, and he answered that they were correct, and that he recognized his liability. That was a conversation with Martindale and Cross. I had other conversations * * * with Martindale separately from Cross. * * * The New York bank had advised me that the Emporia bank was indebted to them $35,000. These figures not appearing on the Emporia bank books, I asked for an explanation." (Cross explained it was not a debt of the Emporia bank, but of Martindale and Cross, and the New York bank afterward verified this, saying its former statement was a mistake.) "In the conversation with Martindale he verified that statement and said the Emporia bank was not, as he knew, indebted to the New York bank, but Martindale and Cross were indebted, as Cross had stated" (R., 101). Of the St. Louis Bank discrepancy, "Martindale stated that grew out of certain indebtedness owing by himself and Cross

and certain indebtedness of Cross personally." * * * I spent Thursday and until three p. m. Friday [November 9th and 10th] in examination of the bank before Cross returned. During that interim I had a conversation with Martindale regarding Cross's indebtedness to the bank. He advised me what Cross's resources were; what his prospects were with reference to the sale then advertised; what other property he had, and opportunities to sell it; how much money he (Martindale) believed would be realized from that sale, and the time he believed would elapse before it would be realized, *turned into the bank*, and applied to the retirement of Cross's indebtedness; then on the evening * * * immediately preceding closing the bank doors, this same matter was gone over with Martindale and Cross. Cross insisted that from the proceeds of the sale of the Sunny Slope cattle, and by December 8th (R., 102), 1898, he would unquestionably have $40,000 to turn over to the bank as proceeds of his advertised sale. * * * As to the amount that would be realized from this property Cross insisted it would reach safely $90,000. I asked Martindale for his judgment with reference to the amount, and he stated that his best judgment was there would be no disappointment as to the estimate Cross had placed on the proceeds of the sale. I then put the question to them as to whether any of their creditors had liens upon this property, that would serve in any way to interfere with the money coming in promptly to the bank. Both answered there was none, and in further response to that question Cross said he could have $40,000, arising from the advertised sale, in the bank before closing hours December 7th. Martindale suggested that he better not be too positive about that, as it would be too close connections, and he better give himself a little more time. No reference was made to any bill of sale to Martindale affecting the property of Cross on Sunny Slope, during that conversation (R., 103). November 21, 1898, the receiver went to Sunny Slope farm, and informed Evans there in charge that he regarded the personal property there as property of the bank, and desired he (Evans) should manage it as theretofore, consulting with the receiver in reference to it and to dispose of stock as opportunity occurred, suggesting that it would be well not to sell property listed in the prospective sale, and agreeing to furnish necessary funds for current expenses from date of

Cross's death. He did pay such expenses. Evans informed the receiver during the week following the closing the bank of a sale of two calves agreed on some days before, for $500, asking direction if it should be closed. The receiver approved the sale, and advised caution as to getting cash at delivery. This was November 22d or 23d, 1898. A few days later Evans (R., 104) turned over the $500. November 28, 1898, the receiver went to Sunny Slope and took formal possession and held it until all the property was disposed of.

Cross-examination (R., 105): The New York bank discrepancy both Martindale and Cross explained as, approximately, $7,000 to $10,000, the individual debt of Cross, and $19,000 to $23,000, the debt of Martindale and Cross jointly, to be exact would have to refer to memoranda then made. Both assented to the correctness of the figures. The term "discrepancies" included *the differences between the amounts* claimed on the Emporia bank books to be due it from the New York and (R., 106) St. Louis banks, and the amounts admitted by those banks to be owing to the Emporia bank. * * * The proceeds of notes discounted for account of Martindale and Cross appear in the accounts of those banks as credited to the Emporia bank, at the same time sums equal, or generally larger, were debited to the Emporia bank for maturing notes of Martindale and Cross. The notes credited were of similar amount as those sued upon. In the conversations with Martindale he unqualifiedly admitted the joint liability of himself and Cross on the $30,000 New York bank note; as to the $20,000 St. Louis bank item Jobes' recollection was not clear.

H. P. Clark (R., 110): Cross was president and director of the Emporia bank from January 12, 1892; cashier from November 1, 1881, to that date. The discount board from January 12, 1897, were Wm. Martindale, H. F. Martindale his son, and C. S. Cross. The board met weekly. H. C. Cross, father of C. S. Cross, organized the bank December 12, 1871, and was its president to January 12, 1872. Wm. Martindlae was director from its organization to its close and vice-president from January 8, 1878. Cross, November 15th and 16th, 1898, owed the bank about $300,000; July 12th, 1898, about $250,000; in March, 1898, between $200,000 and $250,000; in December, 1897, about $200,000.

F. C. NEWMAN, administrator (R., 112): At his death Cross's property outside Sunny Slope did not exceed $2,500, and I know of his having no more in July, 1898, and have known him for 21 years.

W. R. SMELSER (R., 113): Managed some mining ventures, beginning in the spring of 1896, for Martindale and Cross around Galena and Cave Springs, Kansas, (R., 114), the organization of a mining corporation subscription for and issue of shares therein to Martindale and to Cross in March, 1897. (R., 117.) They expended "several thousand dollars" coming from Emporia bank. Martindale was at the workings personally "two, three or four times, perhaps a time or two more," "gave directions what to do," and once gave Smelser his check. (R., 118:) Before organization of the corporation Martindale had a ⅓ interest equal with Cross. (R., 115:) Smelser was succeeded in the management of the Galena enterprise by C. E. Fuller, in the summer of 1897.

C. E. FULLER (R., 119): Took charge of the Galena enterprises perhaps as late as June 1897. Smelser, Martindale, and Cross continued to manage the Cave Springs property. (R., 120:) Martindale, Cross and Fuller composed the Lomond Mining and Milling Company, a partnership, succeeding the Smelser corporation. They built a mill and the machinery was bought in name of Martindale and Cross. December 31, 1897, Martindale wrote Fuller a letter (copy in the record) about a contract with Cooley for erection of a mill. (R., 121:) They expended about $11,000 on the concentrating plant. (R., 124:) Fuller expended there "thirty-odd thousand dollars." (R., 122:) Fuller remained manager to about April 1, 1898. Martindale was at the properties "a great many times," "more often during construction of the mill, than Cross," and gave directions. Fuller made many of his reports by letter to Martindale, one of February 28, 1898, is at R., 122, 127. (R., 124:) Martindale gave only some small checks and once $200 cash to Fuller, and most of the expenditure was paid by the Emporia bank through drafts, one of these by Smelser November 30, 1896, for $150, is at R., 118, and one by Fuller for $500, March 5, 1898, is at R., 121.

R., 170, in the stenographer's report of testimony taken before the court, filed March 22, 1900, is the first of the bills of sale, which Martindale testifies was delivered by Cross to him "early in March, 1898," to secure the bank, and was by him first disclosed at the conference of January, 1900, and on which the receiver's answer was based, and is as follows:

Ex. "I."

R., 170: Know all men by these presents, that in consideration of one dollar and other valuable considerations the receipt of which is hereby acknowledged, I do grant, sell, transfer, and deliver unto W. Martindale as trustee his heirs, executors, administrators, and assigns, the following goods and chattels, viz: All of my personal property, of every kind and description and wherever located with the exception of my personal effects insurance policies and the contents of my house in Emporia, Lyon Co., Kansas. To have and to hold, all and singular the said goods and chattels, forever, and the said grantor hereby covenant with the said grantee that he (—) the lawful owner of the said goods and chattels; that they are free from all incumbrances; that he ha- good right to sell the same as aforesaid, and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said grantor has hereunto set his hand this 4th day of March, A. D. 1898.

C. S. Cross.

Executed in presence of

—— ——.

Next in time are two bills of sale, dated July 14, 1898, found by Mrs. Cross in her box on the day of Cross's death, and by her that evening given to Martindale. Nothing is claimed by any one under them, so they are not here set out.

They are found at R., 167, 168, Exhibits "D" and "E." Then follow in time those which Martindale testifies were delivered to him at their date, and on which the appellants' claims are founded, viz:

Ex. "C."

For and in consideration of one dollar and other valuable considerations the receipt of which is hereby acknowledged I do hereby sell, transfer and assign unto W. Martindale as trustee all my personal property of every kind and description and whatever located, except the contents of my house where I am now living in Emporia, Lyon Co., Kansas, excepting all my policies of life insurance—this sale does not include the notes pledged to my mother for the indebtedness I owe her, amounting to 8375.00 and int., which does not include the 4500 Davis & Cross note. The property which I transfer to the said Martindale is partially described as follows: All my live stock, cattle, hogs, and horses, now located on Sunny Slope farm, Lyon Co., Kansas, together with all other personal property thereon or on farm adjacent—also all notes, stock, bonds and mortgages (excepting as before stated those securing my indebtedness to my mother Sue S. Cross). The said Martindale as trustee is first to protect H. C. Whitley and himself upon a certain bond in the Lyon Co. court, after that he is to pay himself for any paper upon which he and I are mutual makers or endorsers. The balance if any to be paid the First Nat. Bank of Emporia, Ks., for all matter I owe them.

Given under my hand and seal this 15th day of July, 1898.

C. S. Cross.

Ex. "B."

Emporia, Kansas, *Nov.* 15, 1898.

For one dollar and other valuable considerations the receipt of which is hereby acknowledged, I hereby sell, transfer and assign unto W. Martindale or his assigns all my right, title and interest to the following personal property, located in Emporia twp., Lyon county, Kansas, and upon what is known as Sunny Slope farm and the leased lands

thereunto contiguous, all my cattle, horses and hogs, all feed, implements, hay, grain, etc., and also all other personal property located thereon whether specifically described herein or not.

Given under my hand and seal the date above written.

C. S. Cross.

Ex. "H" 2, while not competent evidence, is in the record and is here given as a declaration of Cross, casting some light on these transactions.

Ex. H 2.

I desire to state the misfortunes of myself and the bank have been caused through my faults and errors. I inherited a large debt which I endeavored to meet by going into other schemes which have all been practical failures and only got me deeper into the mire.

As to the bank matters I desire to say that I carefully laid to deceive both the board of directors, the cashier and employees. Mr. Martindale will now learn for the first time how I have carefully deceived him, principally by way of substituted paper of which he has no knowledge. The reports and letters written the comptroller have been by me misrepresented to the board, they having signed on the last page and I having sent other letters than the ones read to them, changing every one but the last sheet. I have had a hard-luck story most of my lifetime,—the only pleasant feature being that of my present wife who has been a good and true woman.

Mr. Davis, our cashier, has never made an improper entry on the books and knows nothing of this whole miserable business. Death I do not fear—it is preferable to the agony of the past year. I know of nothing further to add except as to Mr. Martindale—this—a terrible thing for him for he has trusted me without reserve. I have given him a bill of sale of all my personal property.

C. S. Cross.

Ex. J, which Cross's letter above indicates he may have substituted sheets in, appears at R., 171. The closing sen-

tence of it at least was no doubt unchanged, as a change could not be made without destroying the signatures. Martindale testifies that his signature to it is genuine. This important paper is in part as follows:

Ex. J.

Emporia, Kansas, *Aug.* 2, 1898.

Comptroller of the Currency, Washington, D. C.

Sir: In answer to your favor of the 22d ult. would say

* * * * * * *

2nd. As to direct liability of Martindale & Cross as payers, I really cannot see how Mr. Forman figured it? There was no note of Mr. Martindale in the bank for any sum great or small. There was a note of Martindale & Cross for 5,389.86 and an overdraft for the same parties of 2,885.30 which latter has since been made good. * * * Check of W. Martindale 5,000.00 on Madison was sent to that bank and by them credited to us. W. Martindale trustee for $1000.00 is secured to Mr. M. by about 15,000 worth of clear real estate. The original amount of this note was for 8,000.00. This bank is also secured by more than enough collateral notes to take up the 1,000.00 note. The Excelsior Water Mill Co. is not owned by W. Martindale, but is an incorporated company, Mr. *N.* [M.?] it is true being the largest stockholder holding 13,000 of the $25,000 stock. This company's buildings and machinery are new and modern and have cost over 35,000 within the last two years and they have on hand about $20,000 of wheat and flour.

The note of Thos. Cross endorsed by C. S. Cross is an accommodation endorsement as far as Mr. C. S. Cross is concerned, he never having enjoyed any benefit from the matter whatever. 8,500.00 of the H. C. Cross estate paper is secured by collateral and the estate is entirely and surely solvent. The note of S. K. Cross also belongs to the Cross estate and is endorsed by H. C. Cross and not by C. S. Cross. Both S. K. Cross and H. C. Cross are dead. The legal time for closing the H. C. Cross estate will be in Octo., 1898, at which time an entire closing of the matter will be had and without loss to the bank. The Lomond Co. note of 10,000 has been reduced to 5,000.00 by Mr. Cross, that being his proportion

of the paper. The other portion has been extended still holding Mr. Cross as endorser. The H. L. Liebfried note has been paid by Mr. Cross. Our present position in the matter would therefore be this—Martindale & Cross is erroneous as 26,550.72, Eureka bank 15,000.00 and cash item 5,000.00 on Madison have been paid. Cross items have been reduced 10,000. Excelsior Water Mill Co. is a corporation and the amount due from them is not properly chargeable to Mr. M. In further addition would say that Mr. Cross has been offered 40,000 for some cattle (*which are free and clear*) but upon our advice refused to sell for the figure as they are easily worth 10 or 25 M—more money and negotiations are now in course with two other parties on a 65,000 basis and we believe the cattle will be sold at that price or near it within the next 30 days if not sooner. Matter of Excelsior Co. has not really been increased, but is by reason of two examiners regarding the paper from two different standpoints as it is signed in two ways—one "Excelsior W. M. Co." the other "W. Martindale mill a/c" by making comparison with Mr. Jobes' memo. I think you will find the totals have been reduced. The H. C. Cross estate matter is in the same category—8,500.00 was signed by H. C. Cross prior to his death. The remainder is signed "C. S. Cross, ex'r of the estate of H. C. Cross, deceased." * * *

Emp. Rep. Co. owns a clear business property (3-story brick b'd'g) and it is certainly worth more than the amount named at force sale. C. V. Eskridge shows that he owns something like $35,000 in clear property. Salina Gas Co. has not been increased—perhaps Mr. Jobes did not include the 1,858.04 note in his list. * * * I am sure that Mr. Forman will agree to the Martindale & Cross paper being either erroneous in amount or a reduplication. * * * Matter of legal reserve will be attended to. * * *

As no doubt the department is aware we have been subjected to the most bitter and malignant attacks—anonymous letters to our customers, newspapers, innuendos and every means and methods of bushwackers. We know and feel that we are able to meet all attacks, but we must crave the indulgence of the department. *The large personal and real holdings of the president* and vice-president, *will be devoted towards increasing the strength of the bank.* All the personal and real property of the vice-president is free and clear in every respect; and barring two undivided interests in

R. E. *the property of the president is entirely clear*—the two interests referred to have most excellent equities and the mtgs. on same have been given for balance of purchase-money. As you will notice over 60% of the stock is held by the pres't and V. P. and they are the parties most vitally interested. As we explained previously we have been desirous of cutting down our surplus to 20,000—this was always intended to reduce our taxes (4⅛%) and while we cannot agree with the examiner as to losses, yet we have no desire to contest the question *and if the department will kindly bear with us until the regular meeting in January, 1899, we will at that time charge off $80,000.*

Resp'y, C. S. Cross, *Pres't.*

O. K.
Wm. Martindale.
R. D. Thomas.

Also two letters found in Mrs. Cross's box which Martindale admits are genuine, and his signature to the first one, "F," was proven by H. P. Clark (R., 92, 93), viz:

R., 168: Ex. "F."

Emporia, Kansas, 3, 2, '97.

C. S. Cross, Esq.:

The two notes of $10,000 each made by W. J. Ryan,—one held in St. Louis and the other by 1st Nat. Bank of Emporia, Ks., are my personal obligations and I hereby agree to protect the same.

Yours truly, W. Martindale.

Ex. "G."

Emporia, Kansas, 10, 25, 1894.

C. S. Cross, Esq.

Dear Sir: It is expressly understood that upon the note of W. J. Ryan for 10,000 dated Oct. 24th, payable at 1st nat. bank, N. Y., and by them discounted and which bears the endorsement of Martindale & Cross, W. Martindale and C. S. Cross that I, W. Martindale, am the real maker and

payer of said note; that W. J. Ryan as principal simply gave the note for my accommodation and that C. S. Cross the endorser is only an accommodation endorser for my sole use and benefit.

W. MARTINDALE.

THE ERRORS ASSIGNED (R., 212.)

The 1st and 2d assignments allege error of the court in the definition of appellants' position as suing in the right of Martindale, claiming through and by subrogation to him and entitled to only such rights as he had.

The 5th assignment alleges error in allowing too extended cross-examination of Martindale.

The 9th, 10th, 11th, 12th, 13th, and 14th assignments allege errors in permitting witnesses J. M. Johnson, Jobes, Henning, Plumb, Charles Johnson, and Stotler to testify as to statements made by Martindale before suit was brought or any claim made under the bills of sale of July 15 and November 15, 1898, that to which Jobes testifies being made by Martindale, under oath, to Jobes officially as bank examiner, in Cross's presence, the others after Cross's death.

The 6th, 7th, and 8th assignments allege error in permitting witnesses Albaugh and Lambert to testify as to admissions of Martindale made after suit was brought and pending.

The 3d and 4th assignments challenge the sufficiency of the evidence to sustain the decree.

Discussion of the errors assigned under this general arrangement and in this order better serves the purposes of logical argument than to take the assignments severally.

BRIEF AND ARGUMENT FOR THE RECEIVER.

I.

DEFINITION OF APPELLANTS' POSITION.

Appellants have no independent standing, but can claim only by subrogation to rights in Martindale and through him. There was no error in the court so holding.

This was appellants' understanding and the position assumed at the commencement of suit. The bill (R., 4) and amended bill (R., 13) of the St. Louis bank, after alleging its claim against Martindale and Cross, and that, as between them, it was Cross's debt for indemnity against which he gave Martindale the bills of sale of July 15 and November 15, states its own claim of right that—

> complainant and all other parties who hold paper upon which said Martindale and Cross are mutually bound and which under the agreement between said Cross and Martindale should be paid by said Cross *are entitled to be subrogated to the rights of said Martindale* and to have their claims paid out of said fund.

The New York bank's answer and cross-complaint (R., 19) alleges—

> this defendant *is entitled to be subrogated to the rights of said Martindale* under said chattel mortgages, and to receive of the fund the proceeds of said chattels, as set out in the complaint, its *pro rata* share thereof.

Harvey, by recitals, incorporates the allegation of the St. Louis bank of its right *to be subrogated* to Martindale's right (R., 129), and prays that the proceeds of the sale be a fund

for payment of his note, and all others who prove themselves to come "within the terms of the agreement aforesaid *between Cross and Martindale.*"

Martindale's answer (R., 18) is a confession of all the facts alleged in the bill.

Thus the pleadings and contention of these allied parties are in perfect accord. There is no suggestion of independent right arising to either of the creditors to claim under the bills of sale, but only that they be subrogated (*substituted*) to Martindale's right therein. Nor is such claim indicated by their proofs. The testimony shows no fact like *information to them* of the making of such instruments, or that either of them took the notes with knowledge thereof or relying thereon as security. They took them as ordinary commercial paper in faith of responsibility of the makers and endorsers.

The bills of sale did not run to appellants or either of them, but to Martindale. Their debts were not designated, or any particular debts. The alleged oral agreement was not with view to appellants' debts, but, it is claimed, *generally* to secure Martindale against liability upon *any* debts wherein, as between them, he was surety. Therefore no right inured to any one but Martindale, for, except to and through him, there was no contact of minds, no intent, that could create a pledge of the property to the appellants, and they could claim only, as they did through him, by subrogation or substitution to his right. The indemnity is available to the appellants not immediately in their right, but mediately by substitution to his right, and, if he cannot enforce it, the appellants cannot.

The right of subrogation is an equitable one purely and is subject to equitable principles and doctrines. Pomeroy, Eq. Jur., 2d ed., sec. 1419, *note*, says of it:

> Being a doctrine of purely equitable origin and nature its operation is always controlled by equitable principles. It is, therefore, never enforced so as to defeat or interfere with the

superior or equal equities of third persons growing out of express contract.

In Memphis and Little Rock R. R. Co. *v.* Dow (120 U. S., 287, 301), this court so defined the right, saying:

> The right of subrogation is not founded on contract. It is a creature of equity; it is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties.

Subrogation cannot be allowed when the party under whom it is claimed could not himself assert the right. *It is a derived right existing only when the right exists in him under whom it is claimed.* The claimant stands in the shoes of him he seeks to represent, and beyond that no equity exists.

In Cunningham *v.* Macon and Brunswick R. R. Co. (156 U. S., 400, 419), this court held:

> The creditors' right of subrogation depends on the existence *in the surety* of the rights to which subrogation is sought.

Phenix Insurance Co. *v.* Erie Transportation Co. (117 U. S., 312, 321); St. Louis, Iron Mountain and Southern R'y Co. *v.* Commercial Union Ins. Co. (139 U. S., 223, 235); Wyckoff *v.* Noyes (36 N. J. Eq., 227, 230–'1); Knapp *v.* Sturgis (36 Vt., 727, 729); Franklin Sav. Bk. *v.* Taylor (131 Ill., 376, 385); Walsh *v.* McBride (72 Md., 45, 55); Garrish *v.* Bragg (55 Vt., 329, 337); Eaton *v.* Hasty (6 Neb., 419, 425, 27 Am. Dec., 365).

In the latter case the court held (6 Neb., 425) that:

> Subrogation will not be allowed if it would do substantial wrong, nor when the surety who has paid is indebted to the principal in more than the amount of the debt.

It follows that if Martindale could not equitably hold the property against the claim of the bank or of its receiver,

being indebted to the bank in a greater sum—$76,000 of debt existing when Cross's bills of sale were made and $37,000 upon stockholders' liability—or if he is barred by estoppel or otherwise to hold as against the bank, then appellants, who stand in his shoes and claim only by substitution, are equally barred. That Martindale cannot so claim will be shown in our final point.

Without analyzing severally the cases cited by appellants to support their claim to the benefits of the bills of sale alleged to have been given by Cross to Martindale as indemnity against paper signed by Martindale as surety for Cross, it suffices here to say that on examination none of them will be found in conflict with the principle here contended for. In a proper case—that is to say, where a principal has given a surety the means or securities with which "to pay" the debt—the law no doubt is that a trust is thereby created for him "who is to be the ultimate receiver of the money." That was the case in Russell *v.* Clark's Ex'r, 7 Cr., 69. But in that case the court would not proceed to a decree for want of necessary parties—the assignors—who might have equities to assert. The trust is not absolute, but may be defeated by countervailing equities. Nor can prior and independent rights be affected by such an instrument. It is not claimed that Cross gave these bills of sale to Martindale to enable him "to pay" these debts, but "to pay himself," which is to indemnify himself. As he owed the bank a larger amount, he had no equity against the bank and none can be claimed under him.

II.

There was no error in permitting cross-examination of Martindale as to the making, delivery, and purpose of the bill of sale of March 4, 1898.

The 5th assignment (R., 212, 213) alleges error that when Martindale was produced as a witness to prove the execution, delivery, and purpose of the bills of sale of July 15 and November 15, 1898 (Exhs. B and C, R., 166–'7, and R., 136–'7 and '8), counsel was allowed by the court to interrogate him (R., 144) as to the previous bill of sale of March 4, 1898 (Ex. I, R., 170), under which the receiver claimed and recovered.

The position of the parties was that appellants were seeking to charge the joint debt of Martindale and Cross primarily upon Cross's property and divert it from appropriation to payment of Cross's debt to the bank. Martindale was the principal party adverse to the receiver, the adverse parties, appellants, claiming in his right. A recovery by them would relieve him to that extent of liability upon the joint debt. The nature of the controversy was in chancery and not at law before a jury. Both of these facts bear upon the alleged error. The first, in cases either at law or in chancery, much relaxes the rules of cross-examination. The second so far vests a discretion in the chancellor that error cannot be predicated upon his exercise of it.

It is the settled rule of this court that the limit of cross-examination is largely, if not wholly, in the discretion of the trial judge. The only cases cited by appellants from this court are those wherein the trial court ruled against the party attempting to cross-examine beyond the scope of the examination-in-chief. The decisions go no further than to hold that the discretion of the trial court was not abused, and no error was committed *in refusing* such cross-examina-

tion. No case is cited wherein the judgment was reversed for error in permitting cross-examination into matters not embraced in the examination-in-chief; so the citations made are negative authorities merely.

In Philadelphia and Trenton R. R. Co. *v.* Stimpson (14 Pet., 448, 463, p. 463) it was held:

> The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are, properly, matters belonging to the practice of the circuit court, with which this court ought not to interfere. * * * All courts ought to be, as, indeed, they generally are, invested with a large discretion on this subject. * * * We think that the circuit courts possess this discretion in as ample a manner as other tribunals. We do not feel at liberty, therefore, to interfere with the exercise of this discretion. * * * It is sufficient for us, however, that it was a matter of discretion and practice, in respect to which we possess no authority to revise the decision of the circuit court.

In Johnston *v.* Jones, 1 Black, 210, precisely similar, the court, referring to the foregoing decision, held (p. 447):

> A cross-examination for other purposes must necessarily be guided and limited by the discretion of the court trying the case. *The exercise of this discretion by the circuit court cannot be made the subject of review by this court.* We have looked through the long and searching cross-examination to which this witness was subjected. *There would have been no error if the objection had been overruled.* There was none in sustaining it.

A similar case was Hickory *v.* United States, 151 U. S., 303, 309, where a reversal was sought because the rule was not relaxed. It was held no error.

Wills *v.* Russell (100 U. S., 621) was a case like that at bar. It was assigned for error that a trial court permitted too great latitude of cross-examination. The plaintiff in error cited Philadelphia and Trenton R. R. Co. *v.* Stimpson,

supra, and Houghton *v.* Jones, 1 Wall., 702, 706. The court (p. 626) held:

Both of the cases referred to by the plaintiffs show that the judgment will not be reversed merely because it appears that the rule limiting the cross-examination to the matters opened by the examination-in-chief was applied and enforced; *but those cases do not decide the converse of the proposition, nor is attention called to any case where it is held that the judgment will be reversed because the court trying the issue of fact relaxed the rule and allowed the cross-examination to other matters pertinent to the issue.*

This should be conclusive in the present case. No prejudice was worked to appellants, who had opportunity for re-examination and for rebuttal. It was wholly within the discretion of the trial court and not subject here to review

III.

Nor was it error to permit proof of Martindale's statements, inconsistent with the present claim, made before appellants' suit was instituted.

By assignments 9 to 14, inclusive (R., 214, 217), appellants allege error in permitting proof by six several witnesses of statements made by Martindale before appellants brought suit or asserted claim under the bills of sale of July 15 and November 15, 1898, inconsistent with his claim that they were a security to him for appellants' debts. The statements were made when he alone could have been claiming under these instruments. This evidence was not offered for Martindale's impeachment, as it was taken before the examiner and is in his report of testimony (R., 27 to 127) which closed February 3, 1900 (R., 127), and Martindale did not testify until March 22, 1900, orally before the court, his testimony being in the stenographers' transcript of evidence taken at the trial (R., 136 to 173, incl.).

The first of these statements was under circumstances that require separate consideration.

1. November 9 to 15, 1898, the bank examiner, Jobes, had discovered discrepancies between the accounts of the Emporia bank and those of its correspondents and large indebtedness of Cross to the bank. Cross had made an explanation. Jobes testifies:

(R., 101:) During that time [November 9 and 10] I had a conversation with Mr. Martindale with reference to Cross's indebtedness to the bank. Then he advised me what Cross's resources were; what his prospects were with reference to the sale that was then advertised; what other property he had; what opportunities he had to sell it; how much money he (Martindale) believed could be realized from that sale and the length of time he believed would elapse before the same could be realized, turned into the bank and applied to retirement of Cross's indebtedness, then, the evening before closing the bank [November 15, 1898], this matter was gone over with Mr. Martindale and Cross. Cross insisted that from the proceeds of the sale of the Sunny Slope cattle, and by the 8th day of December (R., 102), 1898, he would unquestionably have $40,000 to turn over to the bank, as the result of the proceeds of his advertised sale and * * * insisted within a given length of time that that money would be in hand and would be applied in that way. As to the amount that would be realized from this property, Mr. Cross insisted it would reach safely $90,000. I asked Mr. Martindale for his judgment with reference to the amount and he stated that his best judgment was there would be no disappointment as to the estimate Cross had placed on the proceeds of the sale of the property. *I then put the question to them as to whether any of their creditors had liens upon this property, that would serve in any way to interfere with that money coming in promptly to the bank. They both answered that there was none.* * * * There was no reference made to a bill of sale affecting the property of Mr. Cross on Sunny Slope during the conversation. * * * It was between 5 and 11 o'clock p. m., November 15, 1898, * * * probably after supper, for the reason that *I was examining the officers of the bank under oath* at that time and the oath was not administered, as I now recall it, until after supper.

This was a statement that the Sunny Slope property in question was unincumbered, made by Martindale under oath as officer of the bank to the examiner in the course of an official examination. It was on the evening of the day when one of the bills of sale purports to have been made and four months after date of the other. Martindale testified (R., 137) that he kept the July 15, 1898, bill of sale till Cross's death, and then gave it to his attorney, and that the November 15 bill of sale he has always kept in his possession, so that when the foregoing statement was made he had, as he claims, both instruments and no one else knew of them. Certainly no one had trusted to them. It was the statement of the sole interested party made under oath administered by authority of law in a proceeding which made it a perjury if untrue.

When Martindale was afterwards on the witness stand he does not materially dispute Jobes's testimony. He admits the examination of Cross and himself under oath by Jobes, November 15, 1898 (R., 141), and (R., 142) says, "*I do not recollect* any such conversation." He could not recollect in what shape he received the bill of sale of July 15, 1898, written on a sheet of paper from which a letter-head had been torn, suspected by examining counsel to have been a Sherman House, Chicago, letter-head, and, as Cross was there after July 15th, suspected to have been of later date. All he said is, "That would be a hard question for me to answer." He "don't recollect" the conversation between Jobes, Cross, and himself about irregularities discovered by Jobes in May (R., 144), but admits Jobes talked with him about it. When pressed with questions about the January conference and his disclosure there of the March 4, 1898, bill of sale (R., 144, 145), he answers, "I don't think I did," "I think so," "I don't believe Mr. Cross ever told me that," "I don't believe I did," "If I did not my attention was not called to it," etc. These are not denials, but evasions. Courts are too familiar with this form of evasion to credit such testimony in the interest of such a witness.

2. The other statements were of different character, but admissible. November 21, 1898, at his house, to J. M. Johnson (R., 95); November 23, 1898, at Whitley's hotel, to Stotler and Charles Johnson (R., 109, 110), and February 23, 1899, at Henning's office, to Henning, Plumb, and J. M. Johnson, acting as a depositors' committee (R., 96, 107, 108), in conversations relating to the property in question as an asset for payment of depositors of the Emporia bank, Martindale made no claim to a lien on the property under these bills of sale or otherwise. The sale was then advertised, and he said, in substance, that the proceeds would all go into the bank and be speedily distributed to the depositors. These parties were seeking from him, as senior and principal surviving officer of the bank, information as to the prospect of its liquidation. His statements to them were irreconcilable with a claim by, under, or in right of, himself upon the Sunny Slope property or its proceeds. Martindale admits the statement of February 23, 1899, to Henning, Johnson, and Plumb (R., 154); he will not deny that of November 21, 1898, to J. M. Johnson (R., 154), and nowhere denies that of November 23, 1898, at Whitley's hotel, to Charles Johnson and Stotler. All these statements stand as proven and expressly or tacitly admitted.

As above shown, Martindale was not only a party, but was the real party primarily interested. Whatever interest the appellants could assert depended "on the existence *in the surety* of the right to which subrogation is sought." The assertion of right to subrogation placed appellants in privity with Martindale, under whom they claimed, and rendered his admissions competent evidence against them.

Bouvier, Law Dictionary, l. v., defines a "privy" as "one who is a partaker, or has any part or interest, in any action, matter or thing," and "privity" as "the mutual or successive relationship to the same rights of property."

Greenleaf, Evidence, 16 ed., vol. 1, sec. 189, says:

The admissions of one person are also evidence against another, in respect of privity between them. The term "privity" denotes mutual or successive relationship to the same rights of property. * * * The ground upon which admissions bind those in privity with the party making them is that they are identified in interest. * * * Where the party by his admissions has qualified his own right, and another claims to succeed him as heir, executor, *or the like*, he succeeds only to the right, as thus qualified, at the time when his title [or as here their claim] commenced; and the admissions are receivable in evidence against the representative in the same manner as they would have been against the party represented.

These admissions of Martindale were therefore competent evidence against the appellants.

These admissions were also competent on another ground. The March 4, 1898, bill of sale was in its terms a trust of all Cross's personal property not therein excepted. The trust was well declared, but the *cestui que trust* was not therein disclosed. The admissions of the trustee were competent, to show to whose benefit the trust was created, and that the Emporia bank was the beneficiary.

IV.

There was no error in allowing Albaugh and Lambert to testify to Martindale's statements, made after suit was commenced, as to the purposes of the bill of sale of March 4, 1898, although such testimony contradicted and incidentally discredited him.

The 6th, 7th, and 8th assignments (R., 213, 214) allege error in admitting the testimony of Albaugh and Lambert of Martindale's statement pending suit as to the making, delivery, and purpose of the bill of sale of March 4, 1898.

The circumstances under which that statement was made were that during the taking of testimony (R., 155) in January, 1900 (R., 27, 127, 157), the defense subpœnaed Martindale to testify (R., 155, 159). There were rumors of prior bills of sale (R., 159) which had color, as Cross's statement of May 12, 1898 (R., 169, Exh. H 2), stated: "I have given him [Martindale] a bill of sale of all my personal property." This had been given publicity, and rumors were afloat that Martindale had a bill of sale of the Sunny Slope property, although the fact of his own bills of sale had been confided only to his attorney (R., 137), and the existence of that of March 4, 1898, had been suppressed until the January interview (R., 159). He disclaimed any lien on the property to J. M. Johnson (R., 97). At the January interview his attorney requested that he should be excused from testifying, as criminal proceedings were pending against him (R., 159), and offered to disclose all he knew about bills of sale (R., 155, 158). There were present the receiver, Albaugh, Lambert, his counsel; Graves and Kellogg, counsel for Martindale; Madden and Spencer, counsel for the administrator, and Huggins (R., 155 to 159). Martindale then disclosed and produced the bill of sale of March 4, 1898, and stated (R., 160, 155, 156) that:

> Cross came into the bank and gave him a bill of sale, handed it to him and he laid it on his desk, that it remained there until after the bank failed, in his desk, that Mr. Cross said to him at the time he handed him the bill of sale "I have used a large amount of the bank's money, I am compelled, or expecting to have to use more of it in the Sunny Slope business, and I want to give this bill of sale for the purpose of protecting the bank or to secure the bank.

This cleared the mystery of Cross's statement of May 12, 1898, *supra*, this being the only bill of sale existing at that time (R., 150) and being without question the one referred to by Cross in that statement. Upon this disclosure the receiver (R., 159) prepared and filed his answer.

It is argued by appellants with much insistence that Martindale was made the receiver's own witness by the question (R., 144) as to the execution, delivery, and purpose of the March 4, 1898, bill of sale, and that having made him his own witness the receiver could not impeach or contradict him. In this contention counsel err.

That bill of sale was a transaction between Cross and Martindale *alone;* the purpose was not therein declared; Cross was dead and Martindale was the sole witness by whom the fact could be proved. He was therefore *a compulsory witness.* Of impeachment of a party's compulsory witness, Greenleaf, 16th ed., vol. 1, sec. 443, says:

Where the witness is not one of the party's own selection but is one whom the law obliges him to call, such as the subscribing witness to a deed, or a will, *or the like;* here he can hardly be considered as the witness of the party calling him, and, therefore, it seems, his character for truth may be generally impeached.

Sec. 444. Whether it be competent for the party to prove that a witness whom he has called, and whose testimony is unfavorable to his cause, had previously stated the facts in a different manner, is a question upon which there exists some diversity of opinion. On the one hand, it is urged that a party is not to be sacrificed to his witness; that he is not represented by him, nor identified with him; and that he ought not to be entrapped by the arts of a designing man, perhaps in the interest of his adversary. On the other, it is said that to admit such proof would enable the party to get the naked declarations of a witness *before a jury*, operating, in fact, as independent evidence; and this, too, even where the declarations were made out of court, by collusion, for the purpose of being thus introduced. But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify; or that the witness has recently been brought under the influence of the other party, and has deceived the party calling him.

All the circumstances mentioned by the writer, as reasons for these exceptions to the general rule, existed here. Martindale was a compulsory wittness; was the real party in interest; had recently stated differently on a promise to make full disclosure; had recently fallen under the influence of the other party; there was no jury to be confused, and the court would give only proper weight to it.

The following authorities fully sustain the doctrine laid down by Greenleaf, above quoted: Cowden *v.* Reynolds, 12 S. & R., Pa., 281, 283; Stockton *v.* Demuth, 7 Watts, Pa., 39, 41; Brown *v.* Bellows, 4 Pick., Mass., 179, 194; Williams *v.* Walker, 2 Rich. Eq., S. Car., 291, 293; Whittaker *v.* Salisbury, 15 Pick., Mass., 534, 544; People *v.* Case, 105 Mich., 92, 96; Whitman *v.* Morey, 63 N. H., 448, 456; Shorey *v.* Hussey, 32 Me., 579, 581; Thornton *v.* Thornton, 39 Vt., 122, 155.

Under section 443, Greenleaf's Evidence, *supra*, in a note the author refers to Dravo *v.* Fabel, 132 U. S., 487, 490, an authority cited by appellants in support of their contentions, with the remark: "*Contra*, quite unsound." This criticism of the learned author will by reference to the case be found hardly just to the court, as the question argued and considered was, whether a State statute for taking the testimony of a party by his adversary "as upon cross-examination" was obligatory in Federal courts in chancery proceedings. The court decided that the State statute did not apply in such cases. That decision is no doubt sound in principle. The reasoning of the court is conclusive. The attention of the court was not directed to the principle here presented, and the decision did not speak upon it.

This testimony was also admissible, for the reason and upon the ground discussed in the final paragraph of the last preceding point of argument, to define the trust and to indicate the Emporia bank as the beneficiary.

V.

The evidence was not only sufficient to sustain a decree for the receiver, but was so conclusive that no other decree could stand upon the facts disclosed by the record.

The bill of sale upon which the decree is based was first in time, upon an adequate, valuable, and sufficient consideration; was prior in equity; was such as was Cross's duty to give and Martindale's to exact, and is first in right.

His bills of sale of July 15 and November 15, 1898, were taken under such circumstances that he could not assert them against that of March 4, 1898, whether innocently taken or not. He was a director and vice-president of the bank, charged with attention to its affairs, with duty to protect it from defalcations, and could not take security on Cross's property to the exclusion of the bank.

(R., 145:) He is asked:

"At the time you received the July bill of sale and at the time you received the November bill of sale you knew of Mr. Cross's indebtedness to the bank? Answer. I did not."

Although he does not deny Jobes's testimony of the conference of November 15th, admits he was then sworn, and that Jobes talked with him in May about Cross's indebtedness, and further on that Bank Examiner Foreman had an examination in July, and says that he signed a paper written by Cross to the comptroller about the condition of the bank, supposing it was the usual report of the bank, such as he had been signing for twenty years. The paper is in the record (Ex. "J," R., 171, 173). It is not in form and does not purport to be a bank statement. It is a remarkable

paper, and conclusively charges Martindale, his signature being admitted by him, with notice August 2, 1898, of the desperate condition of the bank's affairs. The paper contains the statement:

In further addition would say that Mr. Cross has been offered $40,000 for some cattle (*which are free and clear*), but upon our advice refused to sell for the figure, as they are easily worth 10 to 25 M more money, and negotiations are now in course with two other parties on a 65,000 basis, and we believe the cattle will be sold at that price or near it within the next 30 days, if not sooner.

He says of this (R., 147): "I think some sheets have been substituted, some things in there I never heard of." But when probed with the question—

"Then if the item had been in there that it was free from incumbrance, you would have called attention to the fact that you had a bill of sale? Answer. *I don't know whether I would.*"

He would let the false statement go over his signature to deceive the comptroller!

The most remarkable part of this paper of August 2, 1898, to the comptroller in explanation of matters discovered and reported by Examiner Foreman in July are the closing sentences. They immediately precede Mr. Martindale's admitted signature, and so cannot be interpolated matter inserted upon a substituted sheet. It reads:

We know and feel that we are able to meet all attacks, but we must crave the indulgence of the department. The large personal and real holdings of the president and vice-president [Martindale] will be devoted towards increasing the strength of the bank. All the personal and real property of the vice-president is free and clear in every respect; *and barring two undivided interests in R. E. the property of the president is entirely clear.* The two interests referred to have most excellent equities, and the mtgs. on same have been given for balance of purchase-money. As you will notice

over 60 % of the stock is held by the pres't and V. P., and they are the parties most vitally interested. As we explained previously *we have been desirous of cutting down our surplus to 20,000. This was always intended to reduce our taxes* (4½ %), *and while we cannot agree with the examiner as to losses, yet we have no desire to contest the question, and if the department will kindly bear with us until the regular meeting in January, 1899, we will at that time charge off $80,000.*

Resp'y, C. S. Cross, *Pres'd't.*

O. K.
WM. MARTINDALE.
R. D. THOMAS.

The paper closed with the startling proposition to charge off $80,000, which was 40 per cent. of capital and surplus, reducing the nominal or book value of the stockholders' shares to 60 per cent. of its book value. This could not have been a substituted sheet, for it is the *final sentence immediately preceding Martindale's signature, but he supposed it was just an usual report such as he had been frequently signing for twenty years*! The question should have occurred to him how long the capital and surplus, $200,000, could last at the rate of charging off at a stroke $80,000 as losses, and it was notice that serious losses had occurred, and common prudence would prompt to an investigation. The facts were that he owed the bank $76,000, besides his stockholders' liability (R., 139), and Cross owed it $250,000, which before November increased to $300,000, yet Martindale did not know of it (R., 145), although Jobes and he had talked about Cross's indebtedness in May (R., 144), and Foreman had reported to the comptroller in such terms that this startling proposition of August 2d was sent to try and tide over, and Jobes had sworn and examined him November 15, 1898.

It simply comes to this: Under such admitted facts no amount of sworn asseverations can prove his innocence or lack of knowledge. The law will not permit one charged with a duty, to assert ignorance in the face of such facts

Knowledge is conclusively imputed whether he had it or not. He cannot take a security for his own protection from one from whom it is his duty to exact a security for the protection of the trust with which he is charged.

An analysis of the evidence and undisputed facts leaves little doubt of the intention of both Cross and Martindale respecting the bill of sale of March 4, 1898. Cross was then indebted to the bank more than its whole capital and surplus. Martindale, a director and vice-president, held 37 per cent. of the stock. He and Cross had been interested in various losing enterprises which absorbed money of the bank, among which was the Smelser zinc ventures, "several thousand dollars" (R., 117), and the Fuller (Lomond) mining schemes, absorbing "thirty-odd thousand dollars" in 1897 (R., 124); the newspaper and Salina gas and cattle-feeding losses inherited from his father, amounting, respectively, to not less than $20,000 (R., 53), $75,000 (R., 149), and $20,000 (R., 28), in all of which, except the cattle-feeding venture ("S. Nation account"), the testimony shows that Martindale was interested with Cross. Money had to be raised to carry these losses, and the bank, to cover up these misappropriations of its funds, was continually carrying fictitious and "accommodation" paper made payable to "Martindale and Cross," endorsed by them personally, individually, and separately. Martindale helped by his own signature, sometimes alone, as in the case of the two W. J. Ryan $10,000 notes, as shown by his letter of February 3, 1897 (R., 168), one of which notes entered into the St. Louis bank's "discrepancy" (R., 85, 86, 93, 99, 165). This money, squandered in new unfortunate ventures, and also misappropriated to cover for honor "inherited" misappropriations, all came from the bank, and was carried by fictitious paper in its assets. It was Cross's duty to restore it and to secure it until he could make restitution. It was Martindale's interest to get it restored and secured, as he was interested to 37 per cent. of the bank's stock and supposed surplus (or $74,000).

It was his duty as a director and vice-president to look after the bank's interest—to secure it if he could. Under these circumstances the bill of sale of March 4, 1898, was made to Martindale as "trustee" (R., 170) of "all my personal property wherever located, with the exception," &c.

Given, on the one hand, an obligation to make restitution, and, on the other hand, both an interest and a duty to secure it, the presumption becomes strong that an act between two persons so circumstanced was for the purpose in which the obligation, the interest, and the duty all concurred, for "*equity presumes an intent to fulfill an obligation.*"

The testimony of Martindale's representations to Jobes, examiner, early in July, 1898 (R., 164); his written representations to the Comptroller of the Currency August 2, 1898 (R., 171–173), his representations to Jobes, examiner, November 9 and 10, 1898 (R., 98), and under oath November 15, 1898 (R., 102, 165); that the Sunny Slope property was unincumbered, and in November was about to be converted into money and applied to liquidation of Cross's debt to the bank; then the representations to the depositors of November 21, to J. M. Johnson, to Charles Johnson and Stotler, November 23 (R., 109, 110), and to Henning, Plumb, and J. M. Johnson, February 23, 1899 (R., 107, 108, 96), in all of which he disclaimed adverse interest and assured the depositors that the proceeds of the Sunny Slope property would go to the bank for their payment, coupled with his official and fiduciary relation, makes the presumption violent that whatever interest he had was in trust to the bank.

Yet there was no distinct declaration of a trust in him for the bank. There were only Cross's statement of May 12, 1892 (R., 169, 170), that "I have given him a bill of sale of all my property;" the obligation of Cross to secure the bank; the interest and the duty of Martindale to obtain a security; his very many statements that the Sunny Slope property was unincumbered, and that its proceeds would all go into the bank for payment of depositors, and that he had

no "cinch" on it. But the March 4, 1898, bill of sale was withheld and suppressed.

At last subpœnaed to testify, he produces and surrenders it, thus disclosing his trust, and declares what it was (R., 155, 156, 60), viz., that it was given him by Cross to secure the bank the debt which Cross owed and that which he expected further to owe. Here was a valuable and moral consideration on part of the grantor, a duty and interest to obtain it on part of the trustee, an equity, and right on part of the defrauded bank, the beneficiary.

Had Martindale refused to accept the trust, equity would not allow it to fail when finally well declared and founded on both valuable and moral obligation. Assuming that all ne bills of sale were delivered, what was the effect of the first in time? If title in equity passed by the first, none passed by the second or any later one except subject to the first. Hill on Trusts, 60; Perry on Trusts, sec. 77, and Lewin on Trusts, sec. 54, all sustain this doctrine.

Martindale could afterward take no valid bill of sale, pledge, or mortgage of that property already so pledged, except subject to the interest of the bank. He was a director. This court held, in Koehler *v.* Black River Falls Iron Co., 2 Black, 713, that directors (p. 720)—

> hold a place of trust and by accepting the trust are obliged to execute it with fidelity, not for their own benefit, but for the stockholders [and creditors] of the corporation.

In Drury *v.* Cross, 7 Wall., 299, the duty of directors is defined by the court to be (p. 302)—

> to administer the important duties committed to their charge, for the mutual benefit of all parties interested, and in securing an advantage to themselves, not common to the other creditors, they were guilty of a plain breach of trust.

The bill of sale Martindale took March 4, 1898, vested in him the title to, or lien upon, Cross's Sunny Slope property

for security of Cross's debt to the bank. His duty was to convert it and turn the proceeds into the bank for the common benefit of all its creditors. He could not transfer or assign it even to pay valid debts of the bank, for that would amount to a preference of such debts inhibited by section 5242 of the Revised Statutes. The only power he had was to turn it over to the bank to collect. He could not dispose of, assign, or waive such security (Hoyt *v.* Thompson, 5 N. Y., 320, 334; Gibson *v.* Goldthwait, 7 Ala., 281, 292–'3, 42 Am. Dec., 592; Hallowell Bank *v.* Hamlin, 14 Mass., 178, 180; Walworth County Bank *v.* Farmers' Loan and Trust Co., 14 Wis., 325, 329; Luse *v.* Isthmus Transit Co., 6 Ore., 125, 131, 25 Am. R., 506; McKeag *v.* Collins, 87 Mo., 164, 169; Asher *v.* Sutton, 31 Kan., 286, 289).

Trusts in personal property may be established by parol evidence (Allen *v.* Withrow, 110 U. S., 119, 28–'9). The bill of sale of March 4, 1898, while on its face declared to be *in trust*, to Martindale as "trustee," declared neither its purpose nor object. The proof of those elements of the trust was by parol. The conveyance was in the nature of a mortgage and intended to operate as such, and its purpose, even if it conveyed land, may be proved by parol (Villa *v.* Rodriguez, 12 Wall., 323; Flagg *v.* Walker, 113 U. S., 659).

It being valid as such, the beneficial interest vested in the Emporia bank upon its delivery to Martindale. Perry on Trusts, 2d ed., sec. 77, says: "If a trust is once effectually created by parol, it cannot subsequently be revoked or altered by the party creating it." In Hunnewell *v.* Lane, 11 Met., Mass., 163, 167, it was held:

> It was not in the power of the trustee to divest or defeat the trust without the consent of the *cestui que trust.*, except by a sale of the trust property to a *bona fide* purchaser, for a valuable consideration, and without notice of the trust.

Hill on Trusts, p. 60, and Lewin on Trusts, sec. 54, are to the same effect. A trust once impressed upon property will

follow it into whomsoever's hands it comes other than a purchaser for value without notice of the trust. As the later instruments were to Martindale, the trustee and holder of the first bill of sale or mortgage, he could not innocently or without notice take another conveyance of or charge upon the same property. If, therefore, the bill of sale of March 4, 1898, was good in form and description to create a lien upon the property, it is a first lien upon the fund arising from it, even if the later instruments of July 15 and November 15 are themselves valid as second and third liens.

It is contended by appellants that the description in the bill of sale was too indefinite to convey title or to create a lien. The descriptive words were (R., 170):

> All of my personal property, of every kind and description, wherever located, with the exception of my personal effects, insurance policies, and the contents of my house in Emporia, Lyon county, Kansas.

This description was sufficient to convey any chattel property Cross owned, not excluded by the terms of the exceptions. It was entirely capable of being made definite by proof of what property Cross owned and could convey. Such proof would render the identification complete of what property was intended. The property in question was practically all that Cross had, as his entire estate not exempt by law, exclusive of the Sunny Slope property, did not exceed $2,500 in value (R., 112). The description in general terms was sufficient under the law and judicial decisions in Kansas. In Interstate Galloway Cattle Co. *v.* J. K. McLain, 42 Kan., 680, 686, the court held that—

> *All the steers* which Martin had purchased, or which he owned, having been mortgaged, there could be no difficulty in identifying the property covered by the mortgages. We may look beyond the description in the instruments for purposes of identification.

In Crisfield *v.* Neal, 36 Kansas, 278, 281, a chattel mortgage was held good of property described as "one hundred and eighty head of Cotswold and Merino sheep," which were until default to remain in the mortgagor's possession unless he should attempt to remove them from Marion county. The court held that these facts were sufficient to permit identification by proofs of the sheep intended. So in Shaffer *v.* Pickerel, 22 Kan., 619, a mortgage of "250 head of stock hogs," and in Corbin *v.* Kincaid, 33 Kan., 649, "600 head of sheep and their increase for 1882, in the mortgagor's possession in Linn county, Kansas," were held sufficient descriptions as between the parties and those having notice, to create a lien upon the property intended to be charged. The description being sufficient to create a lien, and that being first in time for security of a debt justly due the bank, the receiver's claim upon the fund is first in time and first in right, even if the later bills of sale were valid to create from their dates second and third liens thereon.

There is much reason to doubt whether the bills of sale of July 15 and November 15, 1898, were ever in fact delivered by Cross. The finding of the court was general "that the receiver is entitled to the fund" (R., 173), without specially finding that the later bills of sale were not delivered. The evidence would sustain a finding that they were not, and a further finding that appellants' claims were the debts of both Martindale and Cross as principals.

Some of the undisputed facts are inexplicable, if the bills of sale of July 15 and November 15, 1898, were in fact delivered. Cross evidently regarded the March 4, 1898, bill of sale as potential, and as doing all it was in his power to perform, when, May 12, 1898, meditating suicide, in mitigation of his faults, he says: "I have given him a bill of sale of all my personal property," for then no other of the five bills of sale existed. The November 15 bill of sale could hardly have been delivered that day, as Martindale claims, for the examiner (R., 101) had them with him at the bank, making

explanations and being examined under oath up to eleven o'clock p. m., so they could not have been at Martindale's house. That the July bill of sale was not delivered is the only state of facts compatible with truth in Martindale and Cross's written statements to the comptroller of August 2, 1898 (R., 171, 173), wherein Cross's property, except "two undivided interests in R. E.," is twice stated to be "free and clear" and "entirely clear," or with the truth of Martindale's statements to Jobes of November 9 and 10 (R., 101), and November 15, 1898, under oath (R., 102), that Cross's property was clear of any lien that would prevent its proceeds going to the bank for discharge of Cross's indebtedness.

Another fact tending to the same conclusion is Martindale's anxiety to get papers on the evening of Cross's death, driving him to intrude on Mrs. Cross at such time, not for condolence, but (R., 162) to obtain papers.

"Almost the first thing he said to me was, 'Have you any papers for me, have you found any papers, or is there any papers for me?' He was so insistent that there must be something that I looked through the papers."

She gave him a sealed package, marked "important to Martindale" and "involving a point of law." The package was in a Sherman House envelope (R., 162). One bill of sale she gave him was on letter-head paper. The July 15, 1898, bill of sale is on paper from which the letter-head has been torn and for which he cannot account (R., 143). The entire conduct and all the acts and words of both Martindale and Cross are consistent with this view, or state of fact, and reconcilable with none other.

The cumulative proof becomes conclusive that Martindale received these papers after Cross's death. And it was some time after that that he nerved himself to claim under them for an application of the Sunny Slope property to protect himself. He hesitated and debated whether to do so or not. He held back and suppressed the March 4, 1898, bill of sale.

But, on the other hand, November 21, 1898, he did not assert to J. M. Johnson (R., 96); nor November 23 to Charles Johnson or Stotler (R., 109, 110); nor February 23, 1899, to Henning, Johnson, and Plumb (R., 96, 97, 107, 108) that he had such bills of sale or claims. He never openly so asserted until the filing of his answer (R., 18) April 22, 1899.

Nor is the proof at all satisfactory that any part of these claims was an indebtedness of Cross alone, except the Nation $10,000 note (R., 28). The rest of the claims trace back to indebtedness arising from losing enterprises in which both Martindale and Cross were jointly interested, except the Ryan note, which (R., 85) entered into the claim of the St. Louis bank and was wholly Martindale's debt (R., 168). The farthest back that the claim of the New York bank is traced is to a $30,000 note of March 2, 1897 (R., 89). This was after Martindale and Cross jointly took their plunge into zinc mining adventures (R., 113, 114), when they sunk "several thousand dollars" (R., 117), and "thirty odd thousand dollars" more (R., 124), so that this is, with reasonable certainty, "*certain to a common intent*," shown to have been in fact as in form the joint debt of Martindale and Cross, a part of their losses in zinc.

The evidence, therefore, decidedly preponderates against appellants' claims on both propositions necessary to give them any semblance of claim, viz: (1) that the July 15 and November 15 bills of sale were never delivered in Cross's lifetime, and (2) that Martindale was not merely a surety for Cro[illegible]

While it is true that the circuit court did not specially find upon these facts, still, if such findings be necessarily implied by the general finding, they are abundantly supported by the evidence.

But independently of any such ground, and granting for

purposes of argument all that appellants contend as to Martindale's relation as surety only for debts of Cross, and that Cross, in July and November, made and delivered the two bills of sale for Martindale's indemnity, yet they could not in equity prevail against the higher and prior equity of the Emporia bank under the bill of sale of March 4, 1898.

Martindale was merely a co-conspirator with Cross in looting the Emporia bank. He may not have known the extent of Cross's misappropriations, but he knew of some of them and was guilty himself to $76,000 of debt (R., 139). Cross had been guilty for at least seventeen years, since he succeeded his father to the bank's presidency, and inherited, and for honor struggled long to conceal and to recoup, the then existing misappropriations. Martindale was interested with the senior Cross in two of the original sources of these losses, viz., the Salina gas (R., 148–'9) and the newspaper (R., 44, 54, 55), which account never was settled (R., 45). Both had, at least from Cross's succession to president of the bank, seventeen years, been giving their names as endorsers to fictitious or accommodation paper as a show of assets to cover up these losses.

Cross struggled desperately to keep up appearances and by some fortunate stroke to get means to restore these losses. He was not insensible to his obligations or to the shame of exposure, and deliberately resolved, if exposure came, to choose death rather than to face dishonor. Martindale was of coarser fiber. When exposure came he plotted to rob the dead of the merit of his attempted restoration, and by suppression of the bill of sale of March 4, 1898, and use of those of later date to filch from the depositors all that had not been dissipated of their funds misappropriated by himself and Cross and to divert it for his own relief. He wrongs both the living and the dead. Of these two guilty officers, one glancing over the sad recital cannot but feel less respect for the moral sentiment of the living Martindale than for that of the dead Cross. Had Martindale and Cross both

planned to this end, it is too shockingly iniquitous to be permitted in a court of equity. The Sunny Slope property in equity belonged to the bank. It was all that remained tangible of $300,000 of its misappropriated funds.

Second. Independently of the March 4, 1898, bill of sale, by the joint written pledge of Martindale and Cross, August 2, 1898, to the comptroller (R., 171, 173), and by the joint oral pledge of both, November 15, 1898, to Jobes, the examiner (R., 101, 102), the proceeds of the Sunny Slope property were appropriated and pledged to pay Cross's debts to the Emporia bank. Such pledges amounted to a valid equitable assignment or mortgage of the property to the bank.

By the letter of August 2, 1898 (R., 171, 173), Martindale and Cross stated to the comptroller that—

> Mr. Cross has been offered 40,000 for some cattle *which are free and clear*, but upon our advice refused to sell for the figure as they are easily worth 10 to 25 M more money and negotiations are now in course with two other parties on a 65,000 basis, and we believe the cattle will be sold at that price or near it within the next 30 days, if not sooner. * * * *The large personal* and real *holdings of the president* and vice-president *will be devoted toward increasing the strength of the bank.* * * * Barring two undivided interests in R. E. *the property of the president is entirely clear.*

Mr. Jobes, examiner, testifies (R., 101, 102):

> I particularly call to mind a conversation had with Mr. Cross and Mr. Martindale during the evening preceding the closing of the bank, when they were going over with me the prospects and the assets from which Cross expected to realize a large sum of money, *which money would come into the bank immediately and be applied to the retirement of Cross's indebtedness to the bank.* * * * I spent the day, Thursday, and

until about three o'clock Friday afternoon in examination of the bank before Cross returned. During that interim, I had a conversation with Mr. Martindale with reference to Cross's indebtedness to the bank. Then he advised me what Cross's resources were; what his prospects were with reference to the sale that was then advertised; what other property he had; what opportunities he had to sell it; how much money he (Martindale) believed would be realized from that sale, and the length of time he believed would elapse before the same *would be realized and turned into the bank and applied to the retirement of Cross's indebtedness.* Then on the evening to which I have referred, namely, just immediately preceding the closing of the doors of the bank, this same matter was gone over with Mr. Martindale and Cross. *Cross insisted that from the proceeds of the sale of the Sunny Slope cattle, and by the 8th day of December, 1898, he would unquestionably have $40,000 to turn over to the bank, as the results of the proceeds of his advertised sale,* and show [ed] me telegrams and correspondence from prospective buyers for the residue of the cattle and for Sunny Slope farm, *and insisted within a given length of time,* that *that money would be in hand and would be applied in the same way.* As to the amount that would be realized from this property, Cross insisted it would reach safely $90,000. I asked Mr. Martindale for his judgment with reference to the amount and he stated that his best judgment was there would be no disappointment as to the estimate Cross had placed upon the proceeds of the sale of the property. I then put the question to them as to whether any of their creditors had liens upon this property that would serve in any way to interfere with the money coming in promptly to the bank. *They both answered that there was none* and in further response to that question Cross said he thought he could have $40,000, the money realized from the advertised sale, in the bank, before closing hours, on December 7th. Mr. Martindale suggested that he had better not be too positive about that as it would be too close connections, and he had better give himself a little more time.

Were there no March 4, 1898, bill of sale, or had it been suppressed by Martindale, there was still a sufficient appropriation of the Sunny Slope property in question to payment of Cross's debts to the Emporia bank. A parol mort-

gage, or appropriation of chattel property, is valid at law or in equity. Here was both a written and an oral appropriation of it by both Martindale and Cross, the sole parties interested, even admitting the delivery of the July 15 and November 15 bills of sale. Neither of them, or yet any one save a *bona fide* purchaser for value, without notice, could be heard to claim the property against the bank.

On this subject of equitable mortgages, Pomeroy, Equity Jurisprudence, 2d ed., sec. 1235, says:

> Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforcible against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees *and purchasers or encumbrancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien upon personal property.*

Story's Equity, sec. 1231, on the same subject says:

> There is generally no difficulty in equity in establishing a lien not only on real estate, but on personal property or on money in the hands of a third person, whenever that is a matter of agreement, at least *against the party himself, and third persons who are volunteers or have notice.* For it is a general thing in equity that, as against the party himself, and any one claiming under him voluntarily, or with notice, *such an agreement raises a trust.*

In Blackburn *v.* Tweedie, 60 Mo., 505, 507, the court held that:

> An imperfect attempt to create a mortgage *or to appropriate specific property to the discharge of a particular debt will create a mortgage in equity, or a specific lien on the property.*

In Daggett *v.* Rankin, 31 Cal., 321, 326, the doctrine is thus admirably stated:

The doctrine seems to be well established that an agreement in writing to * * * appropriate specific property to the discharge of a particular debt, will create a mortgage in equity or a specific lien on the property intended to be mortgaged. The maxim of equity upon which this doctrine rests is, that equity looks upon things agreed to be done as actually performed; the true meaning of which is, that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts, contemplated by the parties, had been executed exactly as they ought to have been.

This doctrine is well established, and is supported by a great array of authority, among which are the following decisions: Hanselt *v.* Harrison, 105 U. S., 401, 405; Skiddy *v.* Atlantic, &c., R. R., 3 Hugh's C. C., 320, 355–'7; Morrow *v.* Turney's Adm'r, 35 Ala., 131, 138; Kirksey *v.* Means, 42 Ala., 426, 430; Jackson *v.* Rutherford, 73 Ala., 155, 156; Bell *v.* Pelt, 51 Ark., 433, 14 Am. St. R., 57; Jackson *v.* Carswell, 34 Ga., 279, 280; Peckham *v.* Haddock, 36 Ill., 38, 45; Monticello Hydraulic Co. *v.* Loughry, 72 Ind., 562, 566; Pinch *v.* Anthony, 8 Allen, Mass., 536, 539; Petrie *v.* Wright, 6 S. & M., Miss., 647; Husted *v.* Ingraham, 75 N. Y., 251, 257; Hale *v.* Omaha Ntl. Bank, 49 N. Y., 626, 633; Hovey *v.* Elliott, 118 N. Y., 124, 132; Smith *v.* Smith, 125 N. Y., 224; Bank of Muskingum *v.* Johnson, 47 O. St., 306, 313; De Laire *v.* Kenan, 3 Desaus, S. Car., Eq., 74. 4 Am. Dec., 604; Parks *v.* O'Connor, 70 Tex., 377, 385.

Martindale cannot claim the property "for his indemnity" after having joined thus with Cross in pledging its proceeds to the Emporia bank, nor can the appellants, his creditors, who "can assert only such rights as the surety has." They simply bought notes in faith of the solvency and responsibility of the makers without knowledge of, or

credit given to, this alleged indemnity. They have all they bought or gave credit to.

That one fiduciary of the bank, its vice-president and director and member of its discount board, could take all the property of another of its fiduciaries, its director and president, all his property three times pledged by the president and twice pledged by the vice-president in writing to the comptroller and on oath to the examiner, leaving the bank and its depositors remediless against their flagrant abuses of their trust, so violates every principle of equity as to excite surprise at its audacity and to merit judicial rebuke rather than a grave judicial decision and analysis of the morals and validity of the claim.

Upon the record made no other decree than that rendered by the circuit court could stand and the decree should be affirmed with costs.

Respectfully submitted.

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